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No. 84-1256

Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN HECKMANN and EDWARD T. CAWLEY, individually and on behalf of Local 106, AFL-CIO, Service Employees International Union, a Labor Organization All Cemetery Workers and Members Thereof,

Petitioners,

vs.

CEMETERIES ASSOCIATION OF GREATER CHICAGO, et al.; PEOPLE OF THE STATE OF ILLINOIS ex rel. NEIL F. HARTIGAN, Attorney General; and MERKAZ HARABONIM—CHICAGO ORTHODOX RABBINATE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

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(5—3-8-85)

16 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State statute which makes it unlawful for anyone to restrain, prohibit or interfere with certain burials on Sundays or legal holidays violates the First Amendment?

2. Whether federal labor law pre-empts State legislation enacted to permit certain burials on Sundays or legal holidays?

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CONSTITUTION

First Amendment to the United States Constitution ..... *passim*

In The

Supreme Court of the United States

October Term, 1984

MARTIN HECKMANN and EDWARD T. CAWLEY, individually and on behalf of Local 106, AFL-CIO, Service Employees International Union, a Labor Organization All Cemetery Workers and Members Thereof,

Petitioners,

vs.

CEMETERIES ASSOCIATION OF GREATER CHICAGO, et al.; PEOPLE OF THE STATE OF ILLINOIS ex rel. NEIL F. HARTIGAN, Attorney General; and MERKAZ HARABONIM—CHICAGO ORTHODOX RABBINATE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The State of Illinois in 1983 enacted legislation to prohibit anyone, including labor organizations, from preventing burials on a Sunday or a legal holiday, whenever burials at such times are required by religious conviction. The statute provides that it is unlawful for any person to re-

strain, prohibit or interfere with the burial of a decedent whose time of death and religious tenets or beliefs necessitate burial on a Sunday or a legal holiday. Ill. Rev. Stat. 1983, ch. 21, par. 101(c). The statute also provides that provisions of contracts, agreements or understandings between cemetery employers and their workers which totally prohibit such burials are void and unenforceable as against public policy. Ill. Rev. Stat., 1983, ch. 21, par. 101(a).

The petitioners facially attacked the Illinois statute in the Circuit Court of Cook County, Illinois, on various state and federal constitutional grounds. Their contentions included arguments based on the First Amendment to the United States Constitution, and on a claimed federal preemption under the National Labor Relations Act, 29 U.S.C. sec. 151 *et seq.* ("the NLRA"). The trial court rejected each of the petitioners' claims of constitutional infirmity and upheld the statute.

Petitioners appealed to the Illinois Appellate Court, First District. The Appellate Court, applying conventional constitutional analysis, affirmed the decision of the Circuit Court upholding the statute. The Appellate Court specifically held that the statute did not compel anyone to work on Sundays or legal holidays. *Heckmann, et al. v. Cemeteries Association of Greater Chicago, et al.*, 127 Ill.App.3d 451, 468 N.E.2d 1354 (1st Dist. 1984).

The terms and conditions of the existing collective bargaining agreement between the petitioners' members and their employers already provides that "employees shall be required to work on Saturdays, Sundays or holidays if management so requests," and further provides for premium pay on Sundays and holidays (R. C 23-24).

Petitioners sought leave to appeal the decision of the Appellate Court to the Illinois Supreme Court. That court denied the petition for leave to appeal on November 30, 1984. On February 5, 1985, Petitioners filed their Petition for a Writ of Certiorari, requesting this Court to review the decision of the Illinois Appellate Court.

SUMMARY OF ARGUMENT

The Illinois Act (Ill. Rev. Stat., 1983, ch. 21, par. 101 *et seq.*) provides a reasonable accommodation of religious conviction. The Act does not violate the Establishment Clause, under the three-part *Lemon* test, as found by the Illinois Appellate Court.

Nor does the Illinois Act contravene the Free Exercise Clause. Petitioners' free exercise contention is premised on their interpretation that the Act compels union cemetery workers to work on Sundays and holidays, an interpretation which has been rejected by the Illinois Courts.

The same rejected interpretation of the Act also underlies Petitioners' pre-emption argument. Beyond that, there is no express pre-emption in the NLRA, and states have been left free to regulate aspects of labor law which involve matters of local concern. Burials are a matter of local concern in Illinois.

ARGUMENT

I.

THE FIRST AMENDMENT CHALLENGE

(A) The Establishment Clause

Petitioners contend that the Illinois statute (the "Act") violates the Establishment Clause (Pet., 10-18), on the basis of the "three-pronged" test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (*see*, Pet., 11).

The Illinois Appellate Court expressly considered the *Lemon* test, as well as this Court's analysis in *Lynch v. Donnelly*, ___ U.S. ___, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984):

> To defeat a challenge based on the Establishment Clause, a statute generally must satisfy three criteria: (1) the law must have a secular legislative purpose; (2) its principal effect must neither advance nor inhibit religion; and (3) the law must avoid excessive government entanglement with religion. (*Lynch v. Donnelly*, ___ U.S. ___, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984); *Larkin v. Grendel's Den, Inc.* (1982), 459 U.S. 116, 74 L.Ed.2d 297, 103 S.Ct. 505; *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105.) Pet.App., 5; 127 Ill.App.3d 451, 468 N.E.2d 1354, 1357 (1st Dist. 1984)

and found it satisfied by the challenged statute:

> The act in question has a valid secular purpose. The record indicates that certain religious groups were required to conduct burials on Sundays or holidays because of their religious beliefs and could not always act in accordance with their beliefs because under certain labor agreements, cemetery workers did not

> have to perform interments on those days. The Act eliminated the discriminating effect of the agreements. Statutes designed to eliminate even unintentional discrimination and to accommodate religious beliefs are secular in purpose. (*Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO* (7th Cir. 1981), 643 F.2d 445, 454, *cert. denied* (1981), 454 U.S. 1046, 70 L.Ed.2d 488, 102 S.Ct. 587.) Furthermore, the Act does confer a benefit to one group to the exclusion of others, but relieves a burden on those who were unable to freely exercise their beliefs. It neither requires a particular religious affiliation or theological position nor inhibits the exercise of religious beliefs. Therefore, the Act meets the second criteria. (*Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO* (7th Cir. 1981), 643 F.2d 445.) Finally, we find that the statute does not foster excessive government entanglement with religion because government does not have to involve itself in any administration or planning and religion is not politicized.
>
> 468 N.E.2d at 1358.

The Illinois Court relied on *Nottelson v. Smith Steel Workers, D.A.L.U. 19806, AFL-CIO*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981). *Nottelson* held that reasonable accommodation of religious beliefs does not offend the First Amendment. (*See*, 643 F.2d at 453.) The Act, like the legislation at issue in *Nottelson*,

> . . . does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer. . . . Such accommodations have generally been held compatible with the Establishment Clause. See, *Wisconsin v. Yoder*, 406 U.S. 205, 234-236, 92 S.Ct. 1526, 1543, 32 L.Ed.2d 15; *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684, 96 L.Ed. 954; *Sherbert v. Verner*, 374 U.S. 398, 409, 83 S.Ct. 1790, 1796, 10 L.Ed.2d 965.
>
> 643 F.2d at 454-455

This Act does not favor certain religious sects, and certainly does not favor some over others. Rather, it places all religions on an equal footing by allowing all individuals to be buried according to the dictates of their religious beliefs. The Act safeguards the very religious liberty that the Establishment Clause seeks to preserve. It does not involve the traditional Establishment Clause danger of preferential treatment for religion; it simply relieves observant individuals of a special burden that is not imposed upon others.

Anti-discrimination legislation like this is far removed from "conditions and practices" that the Framers of the Establishment Clause "fervently wished to stamp out in order to preserve [religious] liberty for themselves and for their posterity." *Everson v. Board of Education*, 330 U.S. 1, 8, 91 L.Ed. 711, 675 S.Ct. 504 (1947). Just as a State may prohibit private discrimination in private employment on account of gender, sex, age or physical handicap, it may enact legislation to prohibit discrimination on account of religious belief or observance. *See, Lynch v. Donnelly*, ____ U.S. ____, 104 S.Ct. 1355, 79 L.Ed.2d 604 610 (1984).

(B) The Free Exercise Clause

Petitioners argue that the Act "abridg[es] their right to free exercise of their religion" (Pet., 18). They base this argument on their interpretation that "the act *does* compel union cemetery workers to work on Sundays and holidays . . ." (Pet., 19; emphasis by Petitioners).

That construction of the Illinois statute has been rejected by the Illinois courts, as Petitioners concede (Pet., 18-19). Petitioners' view was rejected both by the trial court and by the Illinois Appellate Court (Pet.App., 127

Ill.App.3d 451, 468 N.E.2d 1354, 1360 (1st Dist. 1984). Accordingly, petitioners' contention in this Court is barred by the final interpretation of the state statute by the state courts.

In any event, petitioners can find no provision in the Act which (i) *requires* any person to work on Sunday, or (ii) permits a court to punish a person for refusing to work on Sunday due to his/her religious beliefs. There is no such provision.

The Act comports with the underlying purpose of the First Amendment, to insure that government maintains a "benevolent neutrality" towards religion:

> [To] insure that no religion be sponsored or favored, none commanded, and none inhibited. . . . [W]e will not tolerate either governmentally established religion or government interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

Petitioners' contention that the Act pits organized labor against organized religion also has no basis. The statute is general. The Act does not apply selectively to organized labor, or even unorganized labor, nor is it restricted to "organized" religion: it applies to "any person" (Ill. Rev. Stat., ch. 21, par. 101(c)).

The statute protects the free exercise rights of persons requiring a Sunday or holiday burial, without infringing the rights of others because it requires no affirmative action on their part. The Act is an appropriate state solution to remove a discriminatory burden.

II.

THE NLRA PRE-EMPTION CHALLENGE

Petitioners argue that "[i]n enacting the National Labor Relations Act, Congress pre-empted the field of collective bargaining agreements . . . ." (Pet., 21 *et seq.*) Petitioners necessarily rely on an implied or "implicit" pre-emption (Pet., 23) by the National Labor Relations Act (29 U.S.C. section 151, *et seq.*) (the "NLRA"), which contains no express pre-emption provision.

However, as this Court has made clear in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976), a decision relied upon by petitioners (Pet., 22):

> "The national . . . Act . . . leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible." Garner v. Teamsters Union, 346 U.S. 485, 488, 98 L.Ed. 228, 74 S.Ct. 161 (1953). Federal Labor policy as reflected in the [NLRA], as amended, has been construed *not to preclude the States from regulating aspects of labor relations that involve "conduct touch[ing] interests so deeply rooted in local feelings and responsibility that . . . we could not infer that Congress had deprived the States of the power to act."* San Diego Unions v. Garmon, 359 U.S. 236, 244, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959).
>
> 427 U.S. at 136 (emphasis added)
>
> In short, a State still may exercise "its historic powers over such traditionally local matters as public safety and order and the use of streets and highways" [citation omitted], for "[p]olicing of such conduct is left wholly to the states." [citation omitted.]
>
> 427 U.S. at 136, n2

It is one thing to argue that Congress intended to leave employers and employees free to use their economic weapons against one another, but quite another to urge that employers and unions are also free to prohibit third parties from obtaining access to their own property. The *Machinists* case stands as authority for the former, not the latter, proposition. As stated by the Illinois court below:

> Just as the NLRA cannot shield an employer or union from making reasonable accommodations to the religious needs of employees, we believe the NLRA cannot be invoked to allow cemetery workers to deprive those whom they serve of their right to practice their religious beliefs.
>
> 127 Ill.App.3d 451, 468 N.E.2d 1358, 1354 (1st Dist. 1984)

See, also, Nottelson v. Smith Steel Workers D.A.L.U. 19806, AFL-CIO, 643 F.2d 445 (7th Cir.), *cert. denied*, 454 U.S. 1046 (1981).

This Court has made it clear that protecting access to property is a matter of local concern and a proper subject of state action *see, e.g., Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154 (1942) (upholding authority of state labor relations board to enjoin union from obstructing access to factory and from blocking free use of streets and sidewalks). The Act at bar protects access to property.

In Illinois, owners of burial plots have protected property interests in their use for interment purposes. *Brown v. Hill*, 284 Ill. 286, 119 N.E. 977 (1918); *Village of Villa Park v. The Wanderer's Rest Cemetery Company*, 316 Ill. 226, 147 N.E. 104 (1925); *People ex rel. Paxton v. Bloomington Cemetery Association*, 353 Ill. 543, 187 N.E. 455

(1932). Moreover, Illinois statutory law clearly establishes that burials and regulations of cemeteries have been matters of state concern and appropriate legislation.*

Burials, and insuring access to burial plots, are inherently matters of local concern. The NLRA does not pre-empt their regulation by the states.

Finally, it should be observed that Petitioners' NLRA argument collapses for lack of a premise, just as their First Amendment contentions are precluded by the state court decision below. The crux of Petitioners' NLRA argument is that cemetery owners "threatening the criminal sanctions of the Illinois Act, [will] direct cemetery employees to make Sunday burials" and thereby commit an "unfair labor practice" (Pet., 23).

To the extent that petitioners' argument is predicated on their speculative fear of what cemetery employees may do in the future, this argument is not properly presented nor ripe for adjudication by this Court, especially not on constitutional grounds.

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* The Illinois legislature has declared it to be the policy of the state to secure freedom from discrimination in real estate transactions and public accommodations, defining "place of public accommodation" to include cemeteries (Illinois Human Rights Act, Ill. Rev. Stat., 1983, ch. 68, par. 6-101(2)). In Illinois, cemeteries are quasi-public: even "private" cemetery authorities are given statutory powers of eminent domain Ill. Rev. Stat., 1983, ch. 21, par. 16 and the power to appoint "police officers" with full municipal police authority Ill. Rev. Stat., 1983, ch. 21, par. 17.

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the petition for writ of certiorari to the United States Supreme Court be denied.

Respectfully submitted,

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